Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

J.B. MAYFIELD, *et al.*,

*Appellants,*

v.

STATE OF TEXAS, *et al.*,

*Appellees.*

**On Appeal To The United States District Court For The Eastern District Of Texas, Tyler Division**

## JURISDICTIONAL STATEMENT

EDWARD B. CLOUTMAN, III
*Counsel of Record*
LAW OFFICES OF
EDWARD B. CLOUTMAN, III
3301 Elm Street
Dallas, Texas 75226-1637
(214) 939-9222

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED

The Mayfield appellants adopt and embrace the questions presented by the appellant Mexican-American Legislative Caucus, Texas House of Representatives in their Jurisdictional Statement. In addition, Mayfield appellants' questions presented are:

Where African-American voters have proven control of the outcome of primary and general elections in districts which they are less than fifty percent (50%) of the voting age population, does the law allow a court to ignore these minority opportunity districts for purposes of Voting Rights Act Section 2 analysis?

Where African-American voters have proven control of the outcome of primary and general elections in districts in which they are less than fifty percent (50%) of the voting age population, does the law allow a court to ignore these minority opportunity districts for purposes of Voting Rights Act Section 5 retrogression analysis?

Where compact contiguous minority influence districts are shown to exist, may the Texas Legislative Redistricting Board and the district court below ignore or split such districts in reapportioning the Texas House of Representatives?

Where the uncontradicted evidence demonstrates that Latino voters constitute a majority of the citizen voting age population in compact voting districts suitable for the Texas House of Representatives, was the district court free to ignore such districts and refuse to protect Latino voters from vote dilution caused by the Texas Legislative Redistricting Board Plan?

## LIST OF PARTIES

Plaintiffs:

1. Simon Balderas
2. Gilberto Torres
3. Brian Manley
4. Frank D. Sandoval, Jr.
5. Eugene Pack
6. Associated Republicans of Texas
7. John Denoyells
8. Morris Overstreet
9. Boyce T. Breedlove
10. David Brown
11. David O. Zambrano
12. Joy Smith
13. Vivian Harris
14. Tony Campos
15. Ed Gonzales
16. Margaret P. Rodriguez
17. Michael Moon
18. Don Pedroza
19. Pauline Dixon
20. Rafael Quintanilla
21. Hargie Faye Savoy
22. Ralph McCloud
23. Dianna Villasana
24. Gina Dixon
25. Alex Vidales, Sr.
26. George Rios
27. Roy Stanley
28. Phyllis Cottle
29. Dorothy M. Lee
30. Molly Woods
31. Texas League of United Latin American Citizens
32. J.B. Mayfield
33. Ledbetter Neighborhood Association

**LIST OF PARTIES** – Continued

34. Williamson County, Texas
35. Texas Farm Bureau Mutual Insurance Company
36. Roy Millner
37. Bonnie Breazeale
38. Bennie Escobar
39. Denise Escobar
40. William R. Leo
41. Jesse Diaz
42. Lulac 4496 of Dallas
43. Stephan Leroy Honore
44. Henry Martinez
45. Atascosa County, Texas
46. Bell County, Texas
47. Grayson County, Texas
48. Johnson County, Texas
49. Wichita County, Texas
50. Texas State Conference of NAACP Branches
51. Texas Coalition of Black Democrats
52. Art Murillo
53. Charles E. Vinn, Sr.
54. Juanita Valdez-Cox
55. Leo Montalvo
56. Rolando Arriola
57. Emily Amps
58. Louis Laster
59. Terry Meza
60. Latino and African-American Voters
61. Residents of Tarrant County, Texas
62. Mexican-American Legislative Caucus, Texas House of Representatives
63. Guy C. Jackson, III
64. John Archer
65. Howard County, Texas
66. The Texas Legislative Black Caucus

**LIST OF PARTIES** – Continued

Defendants:

1. State of Texas
2. Rick Perry, Governor of Texas
3. James "Pete" Laney, Speaker of the Texas House of Representatives
4. Henry Cuellar, Secretary of State of Texas
5. Susan Weddington, Chair of Texas Republican Party
6. Molly Beth Malcolm, Chair of Texas Democratic Party
7. William Owens, Jr.
8. Bill Ratliff, Lieutenant-Governor of Texas
9. John Cornyn, Attorney-General of Texas
10. Carol Keeton Rylander, Comptroller of Public Accounts of Texas
11. David Dewhurst, Texas Land Commissioner
12. Geoffrey S. Conner

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## OPINIONS BELOW

As of this date, the opinion and orders of the three-judge district court reproduced in the attached appendix are not reported. These orders and opinions are the *per curiam* opinion of the three-judge court and the judgment implementing same; the concurring opinion of Chief District Judge John Hannah and the amended judgment of the three-judge court. *Balderas v. Texas*, Case No. 6:01-CV-158 (E.D. Tex. 2001).

## STATEMENT OF JURISDICTION

The Mayfield appellants challenged redistricting plans adopted by the Texas Legislative Redistricting Board for the Texas House of Representatives and the Texas Senate. They have taken a separate appeal from the judgment and opinion regarding the Texas Senate. This appeal addresses the Legislative Redistricting Board Plan as adopted by the three-judge district court for the Texas House of Representatives. Jurisdiction of the three-judge district court was premised upon 28 U.S.C. Section 1343, 42 U.S.C. Sections 1973 and 1983, the Equal Protection Clause of the Fourteenth Amendment as well as the vote guarantees contained in the Fifteenth Amendment to the Constitution of the United States. The initial opinion and judgment of the three-judge court was entered on November 28, 2001, a timely motion to modify and amend judgment was filed by state defendants and the district court amended its ruling on January 18, 2002. A notice of appeal was filed on January 30, 2002.

This appeal was perfected before this Court within sixty (60) days after the filing of the notice of appeal described above. Jurisdiction of this Court is invoked at 28 U.S.C. Section 1253 and 42 U.S.C. Section 1973c.

## THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutory provisions involved in this appeal are Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Sections 1973, 1973c and 1983. Constitutional provisions involved in this appeal are the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the Right to Vote guarantees of the Fifteenth Amendment to the Constitution of the United States.

## STATEMENT OF THE CASE

The Mayfield appellants are a group of citizens from light counties of the State of Texas. They had previously filed an action in December of 2000 which was dismissed as unripe. This action was filed by the Balderas appellants on April 12, 2001, as an action raising violations of the Voting Rights Act and several constitutional protections. On June 5, 2001, an Order was entered creating the three-judge court who later heard this case. The Mayfield parties intervened by pleadings filed on June 14, 2001; such intervention was granted by the three-judge court by its Order of July 23, 2001.

Prior to the intervention of the Mayfield appellants, the Texas Legislature had adjourned without fulfilling its legal obligation to redistrict its House of Representatives and Senate. By virtue of the Texas Constitution, redistricting duties were then mandatorily transferred to the Legislative Redistricting Board ("LRB") which convened, and on July 24, 2001, adopted a plan for both the Texas House of Representatives and the Texas Senate.

As more completely developed in the Jurisdictional Statement of the Mexican-American Legislative Caucus ("MALC") filed with this Court, LRB plans were submitted for pre-clearance pursuant to Section 5 of the Voting Rights Act. Ultimately, the House of Representatives' plan was objected to by the United States Department of Justice pursuant to its Section 5 obligations on November 16, 2001. Mayfield appellants adopt in full as if reproduced here the discussion of these matters set forth in the Mexican-American Legislative Caucus Statement of Case contained in its Jurisdictional Statement to this Court.

Trial on the merits was held concerning the Texas House from November 13th through November 15th, 2001. On November 28, 2001, the district court entered its opinion. The opinion of the three-judge district court regarding the challenges to the House of Representatives' plan is at best cursory in its analysis of the evidence. The objections and complaints of the various parties are delineated by the three-judge court in a way which combines and confuses the parties challenging the plan and their respective positions.

Mayfield appellants had challenged the House of Representatives' plan in a number of geographic areas of

the State of Texas. Because the parties objecting to the LRB plan tried to avoid offering redundant evidence, the objections concerning the House of Representatives' plan were divided among the various parties challenging the LRB plan.

The Mayfield appellants challenged the House of Representatives' plan in South Texas, West Texas, Harris County, Dallas County, Tarrant County, Travis County, and in several East Texas and Brazos Valley counties. Evidence was offered by Mayfield appellants as well as others regarding a variety of VRA Section 2 issues, asserting that the LRB plan violated Hispanic and African-American voting strength in the challenged areas of the State. Claims were made that the violations of Section 2 were both intentional and that the LRB plan had the effect of diluting appellants' right to vote.

Evidence was offered by a number of lay witnesses as well as expert witnesses including Dr. Alan Lichtman, Dr. Richard Engstrom, Dr. Richard Murray, James Aldrete, and Dr. William Kelley. This testimony confirms the existence of minority opportunity districts throughout Harris and Dallas Counties as well as minority influence districts in various counties of the State.

Minority opportunity districts were defined as those districts already in existence, prior to the LRB plan, which effectively had African-American, Latino or African-American and Latino coalition control of the Democratic Primary and the general election, without having fifty percent (50%) of the voting age population.

Minority influence districts were defined as districts that could be created under the census to do the same in areas in Dallas and Harris County, Texas, using voter

participation histories in those areas to demonstrate that even without fifty percent (50%) of the voting age population, African-American, Latino and/or African-American with Latino voting strength could control the Democratic Primary and the general election results.

Despite an abundance of evidence in support of these claims, the only reference to such claims is in a footnote of the district court's opinion (fn. 14) where the three-judge court opines that it has no power to address claims based upon minority influence districts (apparently the court did not determine there to be any significant difference between a minority opportunity district and minority influence district).

Moreover, there is not a word in the three-judge court's opinion regarding the existence of majority citizen voting age population Latino districts nor the LRB plan ignoring same. Without discussion or justification, there is no legal rationale offered to support not recognizing the existence of majority Latino districts and the retrogressive effects of the LRB plan in not incorporating these majority Latino districts. There is no discussion of the effect of retrogression in context of a VRA Section 2 claim.

There is no analysis nor discussion by the three-judge court concerning racially motivated district lines which served to split minority populations and thereby dilute these citizens' voting strength. No reference one way or another to intentional acts as violative of Section 2 will be found in the district court opinion.

On November 30, 2001, Chief Judge John Hannah wrote a concurring opinion which observed the lack of

any rational redistricting process used by the LRB in advancing the plan for the State of Texas House of Representatives.

A Motion to Amend Judgment was filed by the State of Texas and on January 18, 2002, the Court entered its Amended Judgment concerning both the Texas House and Texas Senate decisions. The Mayfield appellants filed their Notice of Appeal on January 30, 2002.

## THE QUESTIONS ARE SUBSTANTIAL AND PLENARY REVIEW SHOULD BE GRANTED

As noted previously in this Jurisdictional Statement, the Mayfield appellants adopt and embrace the arguments of the appellant Mexican-American Legislative Caucus. In order to avoid repetition, Mayfield appellants rely upon the discussion of the Mexican-American Legislative Caucus appellants and add their further arguments for granting review.

Mayfield appellants urge that this Court's decision in *Thornberg v. Gingles*, 478 U.S. 30 (1986) does not require the existence of a fifty percent (50%) plus majority of either Black voting age population or combined Black and Latino voting age population for there to be a cognizable claim under Section 2 of the Voting Rights Act. This Court's holding in *Thornberg* does not mandate such majority districts in all cases nor is the *Gingles'* test to be mechanically applied. *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993); *Badillo v. City of Stockton*, 956 F.2d 884 (9th Cir. 1992); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984).

Additionally, this Court has offered guidance regarding redistricting which manipulates voting district lines for purposes of diluting the voting strength of minority groups. *Johnson v. DeGrandy*, 512 U.S. 997 (1994) and *Voinovich, supra.* Where districts have been shown to be minority controlled districts without having a fifty percent (50%) plus voting age population, courts have found that to dismantle such districts is an independent violation of Section 2. *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

Still other courts have found that redistricting bodies are under an obligation to consider the concept of minority influence districts as a requirement under Section 2. In one such case, a minority group constituting only twenty-nine percent (29%) of the voting age population was found to be an influence district and entitled to cognizance under Section 2 in devising a redistricting plan. *Uno v. City of Holyoke*, 72 F.3d 973 (1st Cir. 1995).

Another three-judge court weighed the use of minority influenced districts as a vote dilution measurement and found that *Gingles* had not set pre-conditions for all challenges to multi-member districting schemes under Section 2. For a claim of racial gerrymandering such as was advanced here, the three-judge court in *Armour v. State of Ohio*, 775 F.Supp. 1044, 1052 (N.D. Ohio 1991) (three-judge court) found that line drawing that precluded minority influence districts was evidence of racial gerrymandering. No less a claim was advanced by the Mayfield appellants, a claim which received no analysis by the district court.

The district court's rejection of authority to consider minority opportunity districts or minority influence districts swept away all of the challenges advanced by the Mayfield appellants in Harris County, Tarrant County, Travis County, Dallas County, northeastern Texas and in the Brazos Valley counties challenged. This Court should scrutinize the district court's rejection of these claims as clear error of law, for there are no fact findings which address one way or another the evidence offered by the Mayfield appellants. Indeed, there are no fact findings at all that address the Section 2 claims premised upon these legal theories.

Additionally, there is no finding of fact nor conclusion of law with respect to the citizen voting age population evidence offered by the parties at trial. By considering that evidence, it is plain that majority citizen voting age population Latino districts existed, such as that in Tarrant County. No mention is made of that fact in the district court's opinion. There is no mention of the existence of a majority Latino voting age population district in Dallas County in the opinion of the district court.

The errors of law and paucity of findings of fact compel the conclusion that this Court should review this matter by noting probable jurisdiction and setting the case for argument.

## CONCLUSION

For all of the foregoing reasons, together with those advanced by the Mexican-American Legislative Caucus

appellants, this Court should vote probable jurisdiction and set the case for argument on its merits.

Respectfully submitted,

EDWARD B. CLOUTMAN, III
(Bar No. 044 110 00)
LAW OFFICES OF
EDWARD B. CLOUTMAN, III
3301 Elm Street
Dallas, Texas 75226-1637
(214) 939-9222
(214) 939-9229 (Telecopier)

*Counsel for Plaintiff/*
*Intervenors*

**APPENDIX A**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

| | | |
|---|---|---|
| SIMON BALDERAS, ET AL. | § | |
| vs. | § | CIVIL ACTION |
| STATE OF TEXAS, ET AL. | § | NO. 6:01CV158 |

This Filing Applies to: All Actions

**FINAL JUDGMENT**

(Filed Nov. 28, 2001)

On the 13th day of November, the above referenced civil action came on for trial. The court heard evidence and argument and considered the parties' post-trial briefing. For the reasons expressed in the court's *per curiam* decision issued today, the court renders judgment adopting Plan 1369H as the remedial House districting plan for the State of Texas.

The Texas Legislative Council's statistical package for Plan 1369H is attached as Exhibit A to this judgment and is incorporated by reference. The maps associated with Plan 1369H are attached as Exhibit B to this judgment and are incorporated by reference.

All relief not granted is denied. Costs of court are taxed against the State of Texas.

So **ordered** and **signed** this 28th day of November, 2001.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT
JUDGE

/s/ John Hannah, Jr.
JOHN HANNAH, JR. /s/ JW
UNITED STATES DISTRICT
JUDGE

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

| | | |
|---|---|---|
| SIMON BALDERAS, ET AL. | § | |
| vs. | § | CIVIL ACTION |
| STATE OF TEXAS, ET AL. | § | NO. 6:01CV158 |
| | § | (Filed Nov. 28, 2001) |

This Filing Applies to: All Actions

Before HIGGINBOTHAM, Circuit Judge, HANNAH and WARD, District Judges.

PER CURIAM:

This phase of the case involves the redistricting of the Texas State House of Representatives following the 2000 census. Following the failure of the state legislature to implement a redistricting plan for the House, the state constitutionally-created Legislative Redistricting Board adopted a plan, Plan 1289H, on July 24, 2001, to redistrict the 150 House seats.[1] Because Texas is a "covered" jurisdiction under section 5 of the Voting Rights Act, the State then submitted this plan to the United States Department of Justice for preclearance on August 16, 2001.[2] We heard evidence relating to House redistricting on November 13-15, 2001. On November 16, 2001, the Justice Department objected to the LRB House plan as causing a retrogression with respect to the number of Hispanic

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[1] *See* Tex. Const. art. III, § 28.

[2] *See* 42 U.S.C. § 1973c.

opportunity districts. We will first describe the course of this litigation and then address the parties' contentions.

I

Voters and various officeholders filed multiple lawsuits in state and federal court challenging the districting of Texas congressional seats and both houses of the state legislature based on the 2000 census.[3] The federal cases were consolidated into the earliest-filed federal action, *Balderas v. Texas*, No. 6:01-CV-150, before this three-judge court.[4]

The Texas Constitution requires that the Texas legislature, "at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts."[5] The Constitution also provides that, "[i]n the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislative Redistricting Board of Texas," which is "composed of

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[3] *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex.); *Mayfield v. Texas*, Civil No. 6:01-CV-218 (E.D. Tex.); *Manley v. Texas*, Civil No. 6:01-CV-231 (E.D. Tex.); *Del Rio v. Perry*, No. GN-003665 (353rd Dist. Ct., Travis County, Tex.); *Cotera v. Perry*, No. GN-101660 (353rd Dist. Ct., Travis County, Tex.); *Connolly v. Perry*, No. GN-102250 (98th Dist. Ct., Travis County, Tex.); *Associated Republicans of Texas v. Cuellar*, No. 2001-26894 (281st Dist. Ct., Harris County, Tex.); *Rivas v. Cuellar*, No. 2001-33760 (152nd Dist. Ct., Harris County, Tex.).

[4] Other three-judge courts had dismissed prior suits filed prematurely.

[5] Tex. Const. art. III, § 28.

five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office."[6] In May 2001, the 77th Legislature adjourned *sine die* without enacting Senate and House redistricting plans and so the LRB convened and adopted Senate and House redistricting plans on July 24, 2001. Under state law, these plans, "executed and filed with the Secretary of State, shall have force and effect of law."[7]

Pursuant to the Supreme Court's direction in *Growe v. Emison*,[8] on July 23, 2001 we deferred proceedings in federal court until October 1, 2001. Proceedings on the congressional redistricting concluded on November 2, 2001 and our order issued on November 14, 2001. The Justice Department precleared the Senate LRB plan on October 15, 2001, and we heard evidence and arguments relating to challenges to that plan on November 5-6, 2001.

From November 12-15, 2001 we heard evidence relating to redistricting of the Texas House of Representatives. We did not reach a judgment, instead awaiting the Justice Department's decision on preclearance of the LRB House plan. On November 16, 2001, the Justice Department objected to parts of the LRB House plan as causing an impermissible retrogression in Hispanic voting strength. The parties submitted post-trial briefs on November 21, 2001 addressing the Justice Department's objection with

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[6] *Id.*

[7] *Id.*

[8] 507 U.S. 25 (1993).

suggested remedies as well as a remedies for any other alleged federal statutory and constitutional defects in the LRB plan.

II

Our decision here is limited to correcting the federal constitutional and statutory defects in the LRB House plan, including the concerns raised in the objection of the Justice Department.[9] That approach is dictated by the Supreme Court's decision in *Upham v. Seamon*.[10] That case dealt with the reapportionment of congressional districts in Texas following the 1980 decennial census. The legislature passed a redistricting plan, which was submitted to the Justice Department for preclearance. As in this case, the Justice Department objected to the state plan. A three-judge district court remedied the problems identified by the Justice Department, but also went further, and changed portions of the map in which the Justice Department had raised no Section 5 concerns. The Supreme Court reversed, noting that it had "never said that the entry of an objection by the Attorney General to any part of a state plan grants a district court the authority to

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[9] To the extent the plaintiffs raise claims that ask that this court enforce state law against the State, they are barred by the Eleventh Amendment, and this court has no jurisdiction to hear them, whether for injunctive or for declaratory relief. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 121 (1984); *Watson v. Texas*, 261 F.3d 436, 440-41 (5th Cir. 2001); *Earles v. State Bd. of Certified Public Accountants of La.*, 139 F.3d 1033, 1039-40 (5th Cir. 1998); *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992).

[10] 456 U.S. 37 (1982).

disregard aspects of the legislative plan not objected to by the Attorney General."[11] The Supreme Court held that a district court's modifications to a state plan, after objections by the Justice Department, should be "limited to those necessary to cure any constitutional or statutory defect."[12]

Speaker Laney argues that *Upham* is not controlling because the Justice Department has raised more numerous concerns in this plan than it did in the 1980 congressional plan. In *Upham* and in this case, because retrogression is measured against the entire State, the Justice Department objected to the entire plan.[13] While our remedy may affect portions of the map adjacent to those districts the Justice Department addressed in its objection, we may not depart from *Upham*. We address first those federal statutory and constitutional claims raised by the parties in this case, and then the Justice Department's objections and our remedy.

## III

### A

Looking first to the Balderas plaintiffs' claims, we find that the Latino population is not sufficiently compact or numerous to support additional Latino districts. We also find that, under the totality of the circumstances, the failure to create additional Latino majority districts will

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[11] *Id.* at 43.

[12] *Id.*

[13] *See id.* at 38 n.1.

not prevent full and equal Latino participation in the political process. Indeed, the creating of additional districts beyond those in our adopted plan would risk giving rise to retrogression in existing Latino majority districts. We conclude that the Balderas plaintiffs have failed to prove that Section 2 of the Voting Rights Act requires the creation of additional Latino districts based upon allegations of Latino vote dilution.[14]

B

The Amps intervenors have similarity failed to identify a violation of Section 2 of the Voting Rights Act that would compel the creation of an African-American opportunity district in Tarrant County. Their proposed minority opportunity district relies on a supposed coalition of Latino, Asian, and African-American populations to achieve majority-minority populations, presenting testimony that members of these populations have worked together in campaigns. The evidence does not persuade us, however, that Latinos, Asians, and African-Americans vote cohesively as required by *Thornburg v. Gingles*[15] so as

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[14] The Mayfield plaintiffs and Speaker Laney invite us to recognize and sustain a challenge to the LRB plan based on minority influence districts. We reiterate that we have no power to address such claims. *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999); *see also Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994) (declining to decide whether "influence district" claims are cognizable under section 2 and citing three prior cases in which the Court similarly declined to so decide).

[15] 478. U.S. 30, 50-51 (1986).

to constitute a majority in a single-member district.[16] There is no section 2 violation, and therefore we have no authority to add an opportunity district.

C

Speaker Laney also argues that certain districts are unconstitutional because they are the product of intentional racial discrimination, in violation of the Equal Protection Clause. We find no such violation.

Having rejected the parties' claims, we now address the Justice Department's objection and fashion a remedy. We detail this remedy below.

IV

Before discussing the Justice Department's concerns and our remedy, we wish to be clear that our plan is a judicial plan and, while it unavoidably bears some resemblance to plans submitted by the parties in certain areas, it is entirely of our own making. Therefore it is not subject to the preclearance requirements of Section 5 of the Voting Rights Act.[17]

The Justice Department concluded that the LRB plan represented an impermissible retrogression of Latino voting strength in South and West Texas. Specifically, the Justice Department objected to the loss of a Latino District in Bexar County, as well as the reduction of Latino

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[16] *See Growe*, 507 U.S. at 41; *Valdespino*, 168 F.3d at 852-53.

[17] *Lopez v. Monterey County*, 525 U.S. 266, 704-05 (1999).

voting strength in Districts 35, 38, and 74. The plan we have adopted addresses all of their concerns.

In Bexar County, the LRB plan reduced the number of majority Latino districts from seven to six. We reconstituted a seventh majority Latino district without pairing any Latino incumbents or splitting any Voter Tabulation Districts, and we equalized the level of Spanish surnamed registration (SSRV) among all seven Latino districts. Each district has an SSRV of at least 55 percent, allowing Latinos in those districts to elect a candidate of their choice.

The Justice Department also objected to the LRB's proposed District 38, which reduced the Spanish surnamed registration level from 70.8 to 60.7 percent. The LRB Plan also removed over 40 percent of the core of the existing District 38, 90 percent of which was Latino. To respond to these objections, we modified the district. The new district has an SSRV level of 73.4 percent and current District 38 residents make up 83.1 percent new District 38. Thus, we preserve the opportunity for Latinos to elect their candidate of choice.

Similarly, the Department objected to the proposed District 74, which reduced the Spanish surname registration level from 64.5 to 48.7 percent. We reconfigured District 74, raising its SSRV level to 54.0 percent, while preserving county lines as required by the Texas Constitution. While the resulting district still has a lower SSRV level than the existing District 74, this is necessary to maintain District 80 as an additional Latino district. The SSRV level in District 74 is high enough to preserve

Latino voting strength, and does not require us to dismantle District 80 or radically redraw the entire state map. The LRB created District 80 as an additional Latino District and our map keeps it as such.

The Justice Department also objected to the proposed District 35. In the LRB plan District 35 paired a Latino incumbent and an Anglo incumbent in a district in which the Anglo had maintained a higher proportion of her constituents. Our modifications eliminate the pairing, maintaining a heavily Democratic District 35 with no incumbent, and an SSRV of 51.5%.

V

There being no reason for delay, we direct entry of final judgment in this case pursuant to Federal Rule of Civil Procedure 54(b).

So **ordered** and **signed** this 26th day of November, 2001.

/s/ Patrick Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

/s/ John Hannah, Jr.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

| | | |
|---|---|---|
| SIMON BALDERAS, ET AL. | § | CIVIL ACTION NO. 6:01 CV 158 |
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This Filing Applies to: All Actions

JOHN HANNAH, JR., Chief District Judge, having concurred in the judgment, writes further.

I have concurred with the legal conclusion reached by my brethern in regard to the House and Senate Redistricting Plan. I write separately to express my shock at the drawing of districts by the State of Texas. The dominant political party treated all members of the opposing party as if they were "enemies of the State" instead of respected state leaders, many with a great wealth of governmental knowledge and ability that has and could insure to the benefit of Texas.

The State has obviously ignored traditional redistricting principles in favor of political expediency. The State's lack of respect for political subdivisions is evident. Two examples from the State's Senate Plan will suffice although many examples from the House and Senate Plan could be cited.

El Paso County's population according to the 2000 Census is 679,622. The population figure for an ideal

senate district is 672,639. A respect for political subdivisions would suggest making El Paso County into a single senatorial district. However, the State unnecessarily splits the El Paso County into Districts 29 and 19. It places the residents of southern El Paso County in District 19 along with 335,367 persons from Bexar County, hundreds of miles away and of a different community of interest.

Even more offensive is Senate District 17, a district described even by the State's own expert witness as weird, odd and bizarre. Stretching over 180 miles from University Park in Harris County to the Louisiana border, it is barely a mile wide in spots, and requires travel by boat to meet the standards of contiguity. Starting in University Park and Bellaire, in Harris County, Anglo enclaves within the borders of the City of Houston, it snakes west through a narrow corridor to another Anglo enclave of middle and upper middle class homes in the western suburbs of Houston, out to the edge of Anglo Katy. It wends it ways south into another exclusive Anglo stronghold in the First Colony area of Fort Bend County, carefully avoiding the sections of Black population in bordering Missouri City while retaining the Anglo populations of Missouri City. After wending its way south through the Anglo portions of Fort Bend County, it reaches into Brazoria County. It then veers northeast along a narrow strip to Galveston County, taking in the Anglo community of Jamaica Beach and a narrow part of the City of Galveston which borders the beach, but draws is line at the neighborhood of Galveston which contain a large Black population. The district continues its northeast direction along the cost of Chambers County, where its main inhabitants are the birds in the Anuhuac

National Wildlife Refuge, the population maps showing zero for human inhabitants in District 17's section of Chambers County. Travel from the Galveston portion of this district into the Chambers County portion of this district, if eschewing a route into District 4, requires a trip on the Bolivar Ferry onto the Bolivar Peninsula. The District ends in Jefferson County, at the border of Louisiana. In Jefferson County, it splits the community of Port Arthur from its suburbs and, more importantly from Beaumont. The district lines show a careful encompassment of the small black community within Port Arthur while rejecting the larger Black bordering community of Beaumont.

Examining District 17, referred to in the trial of this case as the "fish hook," we note its extremely irregularity on its face and deplore the State's rejection of traditional redistricting principles such as compactness, respect for political subdivisions, and community of interests. 6 county lines are split by this district and no whole county is included. Further, District 17 splits 17 or 18 towns and cities in its meander through the coastal plane of southeastern Texas.

The evidence concerning the lack of regard for traditional communities of interest was compelling. Jefferson County residents testified that they are often adverse to residents of Harris County on issues of air pollution and water rights and that the working class communities of Jefferson County have nothing in common with the middle and upper middle class suburbs of Houston or with exclusive University Park. There was testimony that Jefferson County has been wholly within one senate district for the last 168 years.

Further, evidence showed that District 17 as it now stands, was introduced by a last minute amendment, and voted on by the Legislative Redistricting Board over the strong objection of Lieutenant Governor Raftliff who deplored the lack of fairness inherent in voting on an amendment which the public had not have a chance to see.

All this being said, the federal courts have a limited roles in considering challenges to precleared, legislatively-adopted redistricting plans. We may not substitute our judgment for that of the Legislature, in this case, the Legislative Redistricting Board, unless we find that the plan runs afoul of federal law. The state may engage in political gerrymandering even if it "so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact."[1] However, I concur with the legal conclusion that plaintiffs have failed to meet their evidentiary burden of showing that the Texas Senate plan violates the Constitution or laws of the United States, as distasteful as portions of it may be.

SIGNED this 30th day of November, 2001.

/s/ John Hannah, Jr.
JOHN HANNAH, JR.
Chief District Judge

---

[1] *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999).

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

| | | |
|---|---|---|
| SIMON BALDERAS, ET AL. | § | |
| Vs. | § | NO. 6:01CV158 |
| STATE OF TEXAS, ET AL. | § | |

This Filing Applies to:
All Actions

## AMENDED JUDGMENT

(Filed Jan. 18, 2002)

We grant the state's Rule 59 motion to amend judgment (#472) in part. We amend our final judgment in the Senate case (#460) to read as follows:

On the 5th day of November, 2001, the above-referenced civil action came on for trial. The court heard evidence and argument and considered the parties' post-trial briefing. For the reasons previously expressed in the court's *per curiam* decision, the court renders judgment for the State of Texas and affirms that Plan 1988 is the legal Senate districting plan for the State of Texas.

All relief not granted is denied. Costs of court are taxed against the party incurring same.

**So Ordered and Signed** this 18th day of January, 2002.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT
JUDGE

/s/ John Hannah Jr
JOHN HANNAH, JR.
UNITED STATES DISTRICT
JUDGE

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT
JUDGE

## APPENDIX D

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

| | | |
|---|---|---|
| SIMON BALDERAS, GUADALUPE ROMAN, and GILBERTO Z. TORRES,<br><br>Plaintiffs,<br><br>v.<br><br>STATE OF TEXAS; RICK PERRY, in his official capacity as Governor of Texas, WILLIAM R. "BILL" RATLIFF, in his official capacity as Acting Lieutenant Governor of Texas, THE TEXAS HOUSE OF REPRESENTATIVES, THE TEXAS SENATE, JAMES "PETE" LANEY, in his official capacity as Speaker of the Texas House of Representatives; HENRY CUELLAR in his official capacity as Secretary of State for the State of Texas; MOLLY BETH MALCOLM, in her official capacity as Chair of the Texas Democratic Party; SUSAN WEDDINGTON, in her official capacity as Chair of the Texas Republican Party,<br><br>Defendants. | § | CIVIL ACTION NO. 6:01CV158<br><br>(Three-Judge Court) |

| | |
|---|---|
| J.B. MAYFIELD, ROY STANLEY, PHYLLIS COTTLE, DOROTHY M. LEE, and MOLLY WOODS, ET AL., | § § § § § § § |
| Plaintiff/Intervenors. | |

**PLAINTIFF/INTERVENORS' NOTICE OF APPEAL**

(Filed Jan. 30, 2002)

Notice is hereby given that J.B. Mayfield, Roy Stanley, Phyllis Cottle, Dorothy M. Lee, Molly Woods, Boyce T. Breedlove, David O. Zambrano, Joy Smith, Vivian Harris, Tony Campos, Ed Gonzales, Margaret P. Rodriguez, Michael Moon, Dan Pedroza, Pauline Dixon, Raphael Quintanilla, Hargie Faye Savoy, Ralph McCloud, Alex Vidales, Sr., and George Rios, plaintiff/intervenors in the above entitled action, hereby appeal to the Supreme Court of the United States from the judgment, denying relief in the challenge to the redistricting of the Texas House of Representatives, judgment having been entered on November 28, 2001 and subject to the Court's Order on the Motion to Amend Judgment entered on January 18, 2002 making the judgment final.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Respectfully submitted,

/s/ Edward B. Cloutman, III
EDWARD B. CLOUTMAN, III
(Bar No. 04411000)
Law Offices of
Edward B. Cloutman, III
3301 Elm Street
Dallas, TX 75226-1637
(214) 939-9222
(214) 939-9229 (Telecopier)

DAVID R. RICHARDS
(Bar No. 016 846 00)
Wiseman, Durst & Owen
Attorneys and Counselors
1004 West Avenue
Austin, TX 78701-2019
(512) 479-5017

COUNSEL FOR PLAINTIFF/
INTERVENORS

## APPENDIX E

**42 U.S.C. Sec. 1973. – Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**

**(a)**

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

**(b)**

A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population

## APPENDIX F

**42 U.S.C. Sec. 1973c. – Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court**

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a

declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise

require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court

## APPENDIX G

[LOGO] U.S. DEPARTMENT OF JUSTICE
Civil Rights Division

---

*Office of The Assistant Attorney General*
*Washington, DC 20035*

NOV 16 2001

The Honorable Geoffrey Connor
Acting Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Secretary Connor:

This refers to the 2001 redistricting plan for the Texas House of Representatives, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on August 17, 2001; supplemental information was received through October 12, 2001.

We have considered carefully the information you have provided, as well as census data, comments and information from other interested parties, and other information. As discussed further below, I cannot concludes that the State's burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the 2001 redistricting plan for the Texas House of Representatives.

The 2000 Census indicates that the State has a total population of 20,851,820, of whom 11.5 percent are African American and 31.9 percent are Hispanic. The State's voting age population (VAF) is 14,955,061, of whom 10.9

percent are African American and 28.6 percent are Hispanic. One of the most significant changes to the State's demography has been the increase in the Hispanic population. Between 1990 and 2000, the Hispanic share of the State's population increased from 26 to 31.9 percent. Statewide, African American population remained stable.

Under the Voting Rights Act, a jurisdiction seeking to implement a proposed change affecting voting, such as a redistricting plan, must establish that, in comparison with the status quo, the change does not "lead to a retrogression" in the position of minority voters with respect to the "effective exercise of the electoral franchise." See *Beer v. United States*, 425 U.S. 130, 143 (1976). In addition, the jurisdiction must establish that the change was not adopted with an intent to retrogress. *Reno v. Bossier Parish School Board*, 528 U.S. 320, 340 (2000). Finally, the submitting authority has the burden of demonstrating that the proposed change has neither the prohibited purpose nor affect. *Id.* at 328; see also *Procedures for the Administration of Section 5* (28 C.F.R. 51.52).

The constitutional requirement of one-person, one-vote mandated that the State reapportion the house districts in light of the population growth since the last decennial census. We note that the redistricting plan submitted by the State was passed by the Legislative Redistricting Board (LRB), which had assumed reapportionment responsibility under article III of the Texas Constitution after the State legislature was unable to enact a redistricting plan.

The LRB held a series of meetings and hearings, culminating with a meeting on July 24, 2001, at which it

considered new plans submitted by LRB members. The LRB adopted three amendments making substantive changes to the plan then under consideration. These amendments consisted of approximately 14 discrete changes.

The Texas House of Representatives consists of 150 members elected from single-member districts to two-year terms. Under the existing plan, there are 57 districts that are combined majority minority in total population, and 53 are combined majority minority in voting age population. With regard to those with a majority minority voting age population, 31 districts have a majority Hispanic voting age population, seven have a majority black voting age population, and the remaining 15 districts have a combined minority majority voting age population. There are 27 districts where a majority of the registered voters have a Spanish surname.

An initial issue arises as to the appropriate standard for determining whether a district is one in which Hispanic voters can elect a candidate of choice. The State of Texas has provided, and accepted as a relevant consideration, Spanish-surnamed registered voter data as well as election return information and voting age population data from the census. We agree with the State's assessment, although we also consider comments from local individuals familiar with the area, historical election analysis, analysis of local housing trends, and other information intended to create an accurate picture of citizenship concerns. *Campos v. Houston*, 113 F.3d 544, 548 (5th Cir. 1997).

Our examination of the State's plan indicates that it will lead to a prohibited retrogression in the position of minorities with respect to their effective exercise of the electoral franchise by causing a net loss of three districts in which the minority community would have had the opportunity to affect its candidate of choice. Although there is an increase in the number of districts in which Hispanics are a majority of the voting age population, the number of districts in which the level of Spanish surnamed registration (SSRV) is more than 50 percent decreases by two as compared to the benchmark plan. Moreover, we note that in two additional districts SSRV has been reduced to the extent that the minority population in those districts can no longer elect a candidate of choice. In the State's plan these four reductions are only offset by the addition of a single new majority minority district – District 80 – leaving a net loss of three.

As described more fully below, when coupled with an analysis of election returns and other factors, we conclude that minority voting strength has been unnecessarily reduced in Bexar County, South Texas, and West Texas. Because retrogression is assessed on a state-wide basis, the State may remedy this impermissible retrogression either by restoring three districts from among these problem areas, by creating three viable new majority minority districts elsewhere in the State, or by some combination of these methods.

With regard to the problem areas we have identified, in Bexar County the 2000 Census data indicated that the county population constituted 10.4 ideal districts. As a result of the State's constitutional requirement of assigning a whole number of districts to the more populous

counties, known as the "county line rule," the state reduced the number of districts in the county from 11 in the existing plan to 10. Although the State has admitted that the reduction to 10 would not have precluded it from maintaining the number of majority Hispanic districts at seven, it in fact chose to reduce that number to six. Initially, the State asserted that it had created an additional majority Hispanic district in Harris County so as to offset the loss of the Bexar County district and identified District 137 as a compensating district. Because the State's obligation under Section 5 so to ensure that the redistricting plan, as a whole, is not retrogressive, such a course of action is not impermissible. However, in the supplemental materials that were provided on October 10, 2001, the State notified us that if any district should be considered as the replacement, District 80 in South Texas – not District 137 – should be the one which offsets the loss of the majority Hispanic district in Bexar County.

When the State is considered as a whole, however, this argument is ultimately unpersuasive. While District 80 indeed adds an additional district in which Hispanic voters in South Texas will have the opportunity to elect a candidate of their choice, in two other districts, as discussed below, they lose this opportunity, resulting in the net loss for Hispanic voters of one district in South Texas.

In South Texas Hispanic voters will lose the opportunity to elect their candidate of choice in District 35. The new district is created from existing Districts 31 and 44 and pairs an [sic] nonminority and a Hispanic incumbent. The Hispanic incumbent currently represents a district which has a Spanish surname registration level of 55.6 percent; that level drops to 50.2 percent in the proposed

plan while the Hispanic voting age population decreases from 57.8 to 52.1 percent. Over half (58%) of the new district's configuration is from the nonminority incumbent's former district. Our analysis indicates that District 35 as drawn will preclude Hispanic voters from electing their candidates of choice.

In addition, in [sic] Cameron County District 38 reverts to a configuration that previously precluded Hispanic residents from electing a candidate of their choice. The Spanish surnamed registration level is reduced from 70.8 to 60.7 percent, and the Hispanic voting age population decreases from 78.7 percent to 69.6 percent. The State removed over 40 percent of the core of existing District 38, 90 percent of whom are Hispanic persons, and replaced it with population that is 45 percent nonminority. While the Hispanic voters in District 38 still remain a majority of voters in the district, because the area is subject to polarized voting along racial lines and under the particular circumstances present in this district, it is doubtful that Hispanics will be able to elect their candidate of choice.

Finally, the districts adjacent to Districts 35 and 38 have levels of Spanish surnamed registered voters exceeding 80 percent, and Hispanic voting age population exceeding 90 percent, both of which are far beyond what is necessary for compliance with the Voting Rights Act. Thus the reductions in Districts 35 and 38 were avoidable had the State avoided packing Hispanic voters into the districts adjacent to them. Moreover, overall the State fragments the core of majority Hispanic districts in this area, thus affecting member-constituent relations and existing communities of interest in these districts at a

disproportionately higher rata than it does other districts in this part of the State. This fragmentation is unnecessary and disadvantages Hispanic voters by requiring them to establish new relations with their elected representatives. It also deviates from the State's traditional redistricting principles in a manner that exacerbates the retrogression in South Texas.

As for West Texas, Hispanic voters lose the opportunity to elect their candidate of choice in proposed District 74. The Spanish surname registration level decreases from 54.5 to 48.7 percent, and the Hispanic voting age population decreases from 73.4 to 57.3 percent. Significantly, the State did not need to reconfigure existing District 74 because the existing configuration under the 2000 Census was underpopulated by only 894 persons, a deviation of 0.64 percent. Such unnecessary population movement supplements our finding in our election analysis that Hispanic voters in District 74 will suffer a retrogression in the effective exercise of the electoral franchise. See *Guidance Concerning Redistricting and Retrogression under Section 5 of the Voting Rights Act*, 42 U.S.C. 1973c. 66 Fed. Reg. 5411, 5413 (Jan. 18, 2001).

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973); see also *Procedures for the Administration of Section 5* (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. On behalf of the Attorney General, I must object to the 2001 redistricting plan for the Texas House of Representatives. Beyond the specific discussion

above, however, in all other respects we find that the State has satisfied the burden of proof required by Section 5.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the redistricting plan continues to be legally unenforceable. *Clark v. Roemer,* 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call Mr. Robert Berman [202-307-3718], Deputy Chief of the Voting Section.

Sincerely,

/s/ Ralph F. Boyd, Jr.
Ralph F. Boyd, Jr.
Assistant Attorney General
Civil Rights Division

Supreme Court, U.S.
FILED
MAY - 3 2002
OFFICE OF THE CLERK

No. 01-1453

# In the Supreme Court of the United States

J.B. MAYFIELD, *et al.*,
*Appellants*,
v.
STATE OF TEXAS, *et al.*,
*Appellees*.

**On Appeal from the United States District Court for the Eastern District of Texas, Tyler Division**

## MOTION TO DISMISS OR AFFIRM

JOHN CORNYN
Attorney General of Texas
JULIE CARUTHERS PARSLEY
Solicitor General
*Counsel of Record*
LISA R. ESKOW
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

ANDY TAYLOR
LOCKE LIDDELL & SAPP LLP
600 Travis, Suite 3400
Houston, Texas 77002
(713) 226-1400

C. ROBERT HEATH
BICKERSTAFF, HEATH, SMILEY, POLLAN, KEVER & MCDANIEL, L.L.P.
816 Congress Ave., Suite 1700
Austin, Texas 78701
(512) 472-8021

COUNSEL FOR APPELLEES

## QUESTIONS PRESENTED

1. Whether Appellants may incorporate by reference arguments made by another party in a separately docketed, direct appeal.
2. Whether the arguments incorporated by Appellants should be dismissed because they attack a redistricting plan that is not properly before this Court.
3. Whether the judgment should be summarily affirmed because §2 of the Voting Rights Act does not require a state to draw "influence" districts.

## LIST OF PARTIES

Although Appellants properly list Henry Cuellar, in his capacity as Texas Secretary of State, as a party to the action below, he is not a party to this appeal because the current Texas Secretary of State is Gwyn Shea.

Former Texas Secretary of State Cuellar was originally named in his official capacity as a defendant below, but he resigned from office in late 2001. Geoffrey S. Connor then served as Acting Secretary of State, and he automatically substituted for Secretary Cuellar in the proceeding below. FED. R. CIV. P. 25(d)(1). For this appeal, however, the current Secretary of State, Gwyn Shea, is automatically substituted, in her official capacity, in place of Acting Secretary Connor. SUP. CT. R. 35.3.

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# In the
# Supreme Court of the United States

J.B. MAYFIELD, *et al.*,
*Appellants*,

v.

STATE OF TEXAS, *et al.*,
*Appellees.*

**On Appeal from the United States District Court for the Eastern District of Texas, Tyler Division**

## MOTION TO DISMISS OR AFFIRM

Pursuant to Supreme Court Rule 18.6, the State of Texas, Texas Governor Rick Perry, and Texas Secretary of State Gwyn Shea (collectively "the State") move to dismiss this appeal because it attempts to incorporate by reference arguments raised by another party in a separately docketed, direct appeal that attack a plan not properly before this Court. Otherwise, Appellees ask that the Court affirm the judgment on the ground that the questions presented are so insubstantial as not to require further argument. SUP. CT. R. 18.6.

### STATEMENT OF THE CASE

The State directs the Court to the statement of proceedings set forth in the three-judge court's opinion, which is a fair recitation of the proceedings leading up to this appeal. J.S. App., at 3-6.[1]

1. Appellants' jurisdictional statement will be cited as "J.S."

## ARGUMENT

### I. THE COURT SHOULD DISMISS THE PORTION OF THIS APPEAL THAT INCORPORATES ARGUMENTS BY REFERENCE.

#### A. Appellants Cannot Incorporate Arguments Made by Another Party in a Separately Docketed Direct Appeal.

Appellants attempt to "adopt and embrace" questions presented to this Court in a separately docketed direct appeal brought by the Mexican American Legislative Caucus—Texas House of Representatives ("MALC").[2] J.S., at i, 3, 6, 8-9. This incorporation by reference, however, presents nothing for the Court's review. While the Court's rules specifically allow two or more parties to jointly submit a jurisdictional statement, SUP. CT. R. 18.2, the rule also contemplates that any joint submission will be made in the same appeal: "Parties who file no document will not qualify for any relief from this Court." *Id.* The Mayfield Appellants neither filed a jurisdictional statement in MALC's appeal, nor did they join MALC's jurisdictional statement.

If the Mayfield Appellants desired to adopt the arguments presented by MALC, the proper method was to do so in MALC's appeal—not this one. And the Mayfield Appellants were fully able to do so, because the Texas House of Representatives plan is also at issue in MALC's appeal. *See* App., at 18-20. Appellants' attempt to incorporate issues and briefing from MALC's appeal is improper, and that portion of the appeal should be dismissed.[3]

---

2. That appeal is styled *Mexican American Legislative Caucus-Texas House of Representatives v. Texas*, No. 01-1225.

3. In the event the Court determines that Appellants' incorporation is proper, the State also incorporates its Motion to Dismiss or Affirm filed in MALC's appeal, No. 01-1225, in response.

### B. To the Extent that Appellants Incorporate MALC's Arguments, Those Arguments Attack a Plan That Is Not Properly Before This Court.

As previously discussed, Appellants purport to adopt the §2 challenges[4] made by MALC in its direct appeal. However, MALC's appeal (and Appellants' adopted arguments) attack the Texas House plan passed by the Legislative Redistricting Board ("LRB"),[5] not the plan adopted by the district court. These arguments, therefore, assail a plan that was never precleared, never became effective, and is not before this Court on appeal.[6]

As a matter of law, a legislative plan is not effective until it is precleared; therefore, any court ruling on a §2 challenge to an unprecleared plan would be advisory. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 542 (1978) ("A new reapportionment plan . . . will not be considered 'effective as law' . . . until it has been submitted and has received preclearance under §5. . . . [U]ntil clearance has been obtained, a court [should not] address the constitutionality of the new measure."); *Connor v. Waller*, 421 U.S. 656 (1975) (because an act is not effective until it is precleared, the district court erred in deciding constitutional challenges based on claims of racial discrimination).

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4. Appellants and MALC bring their challenges under §2 of the Voting Rights Act. *See* 42 U.S.C. §1973.

5. The LRB has a constitutional duty to reapportion seats in the Texas House of Representatives and Texas Senate, but not Congress, after a decennial census if the Texas Legislature fails to do so. TEX. CONST. art. III, §28. The LRB passed a plan for both the Texas House and Senate, which were sent to the Department of Justice for preclearance.

6. The State raised this argument in its Motion to Dismiss or Affirm filed in response to MALC's jurisdictional statement. *See* Mot., at 4-5 (No. 01-1225).

The three-judge court carefully structured Texas's redistricting litigation—which consisted of trials on each of the three redistricting plans drawn for the Texas Senate, the Texas House of Representatives, and Texas's Congressional districts—to avoid considering any unprecleared, and thus ineffective, plans. Accordingly, the court tried the cases in the order most likely to avoid consideration of a plan that, if subject to preclearance requirements, had not yet been reviewed by DOJ.

The three-judge court first tried the congressional case, since the Texas Legislature failed to pass a congressional plan and, therefore, there was no pending DOJ review.[7] The court next heard challenges to the LRB's Texas Senate plan, which had been precleared. This left only the Texas House plan, which was under review by the DOJ. Due to the time constraints of the 2002 elections, however, the three-judge court began the Texas House trial on November 12, 2001, even though DOJ had not yet ruled.[8]

Following the example of *Upham v. Seamon*, 456 U.S. 37, 38 (1982), and *Terrazas v. Clements*, 537 F.Supp. 514, 519 (N.D. Tex. 1982), the three-judge court heard evidence on the Texas House plan promulgated by the LRB, but it did not act until DOJ ruled.

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7. Initially, the three-judge court deferred federal proceedings until October 1, 2001, to give Texas's state courts an opportunity to address redistricting concerns. *See Growe v. Emison*, 507 U.S. 25 (1993). Once it became apparent that the state courts would be unable to timely complete this task, the three-judge court proceeded with the federal trials.

8. The House trial began three weeks before December 3, 2001—the first day for candidate filing for the 2002 elections. TEX. ELEC. CODE §172.023(b). Filing was scheduled to close on January 2, 2002, 51 days after the first day of trial. *Id.* §172.021(c). Optimally, a court would not hear evidence until after DOJ acted. Here, however, the imminence of the 2002 election process required the three-judge court to adopt this procedure if there was to be any possibility of deciding the case before the 2002 elections.

Because DOJ found that the LRB plan retrogressed in violation of §5, *see* App., at 25-32, the three-judge court fashioned its own plan to address DOJ's objections without unnecessarily disrupting the unobjected-to portions of that plan. *See Upham*, 456 U.S., at 41-43. Accordingly, the three-judge court remediated the deficiencies and rendered a map that violates neither §5 nor §2. App., at 1-11.

Consequently, it is the three-judge court's remedial plan—not the ineffective LRB plan—that determines Texas's House districts. The LRB map is not before this Court and any pronouncement on the ineffective LRB plan would be an impermissible advisory opinion.[9] Because Appellants' incorporated arguments challenge the LRB plan, these claims should be dismissed.

## II. THE REMAINING QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND THE COURT SHOULD SUMMARILY AFFIRM.

The question of influence districts has been raised since the Court's decision in *Thornburg v. Gingles*, 478 U.S. 30, 46-47 & n.12 (1986). Beginning with *Gingles*, this Court has consistently declined to address whether influence-district claims are cognizable under §2. *See, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994) (assuming, without deciding, that *Gingles*'s first prong could be satisfied by a minority group that fails to comprise an absolute majority of the relevant population in additional districts) (citing similar approaches in *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993), *Growe v. Emison*, 507 U.S. 25, 41-42 & n.5 (1993), and *Gingles*, 478 U.S., at 46-47 & n.12).

Only two circuits have squarely addressed the issue and both rejected the existence of a §2 influence claim. *See Cousin v.*

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9. To the extent the arguments can be viewed as challenging the three-judge court's plan, the record, which was made before the §5 objection caused the district court to draw its own plan, does not directly address that plan.

*Sundquist*, 145 F.3d 818, 828-29 (CA6 1998), *cert. denied*, 525 U.S. 1138 (1999); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (CA7 1988). Additionally, the Fifth Circuit has implicitly rejected the influence-claim concept. *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 108 F.3d 848, 852-53 (CA5 1999) (noting that this Court has always required "vote dilution claimants to prove that their minority group exceeds 50% of the relevant population in the demonstration district," with the "relevant" population being determined by "voting-age and citizenship"), *cert. denied*, 528 U.S. 1114 (2000).

Appellants incorrectly suggest that influence-district claims have been upheld by two circuits. In neither of these cases, however, did the court consider the validity of an influence claim or did the party seeking relief actually prevail on an influence claim. Instead, in *Uno v. City of Holyoke*, the circuit court remanded the case on different grounds, and noted that the district court should also consider the validity of the influence claim on remand. 72 F.3d 973, 990-91 (CA1 1995). And, in *Garza v. County of Los Angeles*, the Ninth Circuit rejected the county redistricting board's map for two reasons, neither of which was based on the recognition of a pure influence claim.[10] 918 F.2d 763, 776 (CA9 1990), *cert. denied*, 498 U.S. 1028 (1991).

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10. The *Garza* court first held that the board's plan was not entitled to deference because it had not passed with the requisite number of votes required to validate the plan. *Garza*, 918 F.2d, at 776. Second, the court held that there was no good faith effort to comply with §2 because the board had used "unnatural configurations" to place an Anglo incumbent in a Hispanic district and had fragmented some Hispanic communities "in the same manner in which the Board had deliberately diluted Hispanic influence in the past." *Id.* The court did not hold that the appellants had made out a valid influence claim, and in fact pondered, without deciding, whether such a claim could actually exist under *Gingles*. *Id.*, at 770 n.2.

Nor does *Armour v. Ohio,* 775 F.Supp. 1044 (N.D. Ohio 1991), support Appellants. Although the district court in *Armour* determined that an influence claim was viable, that holding does not survive the Sixth Circuit's subsequent decision in *Cousin v. Sundquist*, which squarely rejected the validity of influence-district claims. 145 F.3d, at 828-29 (citing *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947-48 (CA7 1988)). Therefore, *Armour*'s contrary holding has been abrogated.

In short, the concept of influence districts has been around for more than sixteen years, and the circuit courts have uniformly rejected those claims. Because the lower courts are resolving the issue in a consistent fashion, there is no conflict or uncertainty warranting this Court's intervention, and, accordingly, the question is not substantial.

Indeed, moving from the *Gingles* clearly delineated 50% threshold toward an "influence" standard would inevitably push courts away from judicially manageable criteria and toward the political thicket. *See, e.g., Gaffney v. Cummings,* 412 U.S. 735, 749-50 (1973) (warning courts of the hazards of the "political thicket" when adjudicating reapportionment cases). "Influence" is a particularly amorphous concept, as virtually any level of concentration of a racial or ethnic group can amount to some level of influence. How is a court to determine when that level is sufficiently high to be judicially cognizable? If the Court is to address the question of influence districts, it should to do so only after the conflicts have actually developed below which present the Court with concrete "influence" issues to review.

Accordingly, the judgment should be summarily affirmed.

## CONCLUSION

The Court should dismiss the portions of the appeal that either attempt to incorporate arguments by reference or that present issues that are not properly before this Court. Otherwise, Appellees ask the Court to summarily affirm the judgment of the three-judge court. SUP. CT. R. 18.12.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas
JULIE CARUTHERS PARSLEY
Solicitor General
*Counsel of Record*
LISA R. ESKOW
Assistant Solicitor General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

ANDY TAYLOR
LOCKE LIDDELL & SAPP LLP
600 Travis, Suite 3400
Houston, Texas 77002
(713) 226-1400

C. ROBERT HEATH
BICKERSTAFF, HEATH, SMILEY,
POLLAN, KEVER & MCDANIEL, L.L.P.
816 Congress Ave., Suite 1700
Austin, Texas 78701
(512) 472-8021

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COUNSEL FOR APPELLEES